No. 13009.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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In the Matter of

RUTH VENA JOHNSON,

Bankrupt.

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GEORGE GARDNER, as Trustee in Bankruptcy for the Estate of Ruth Vena Johnson,

*Appellant,*

*vs.*

RUTH VENA JOHNSON,

*Appellee.*

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## APPELLANT'S BRIEF.

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This is an appeal from an order of the District Court of the United States for the Southern District of California, Honorable Leon R. Yankwich, Judge, reversing an order made by Referee in Bankruptcy, Benno M. Brink, which quieted title to certain real property described therein in favor of the Trustee and against the fraudulent bankrupt, Ruth Vena Johnson, and which order of the District Judge decreed that this fraudulent bankrupt was entitled to a homestead allowance of $7,500.00 out of property recovered by the Trustee which had been concealed by the bankrupt after the fraudulent conveyance.

## Jurisdictional Statement.

The original jurisdiction of the District Court was invoked by the bankrupt under Section 2, Subdivision 1 of the National Bankruptcy Act by the filing of her voluntary petition in bankruptcy praying for adjudication under the provisions of Section 4-a of the National Bankruptcy Act, and under which the bankrupt was adjudicated. The jurisdiction of this Court is invoked under the provisions of Section 24-a of the National Bankruptcy Act. The jurisdiction of the District Court in the proceeding in *Gardner, Trustee v. Venes, et al.,* which will be later referred to, and in which the fraudulent conveyance by the bankrupt of her property was avoided, was invoked under the provisions of Section 70-e of the National Bankruptcy Act. (11 U. S. C. A., Sec. 110E.)

The summary jurisdiction of the Referee to quiet title to the real property in question, in the possession of the Trustee, was likewise invoked under Section 70-e of the National Bankruptcy Act, and the jurisdiction of the District Court on review was invoked by the bankrupt under Section 39-c of the National Bankruptcy Act.

## Statement of the Case.

Ruth Vena Johnson, the bankrupt herein, filed her voluntary petition in the United States District Court for the Southern District of California on April 24, 1947, and was adjudicated a bankrupt under said petition. [Tr. pp. 3 and 9.] In her voluntary petition under Schedule B-1, she scheduled real estate "none." Under Schedule B-5, "Property claimed to be exempt under Federal and State Laws," she likewise scheduled "none." Under Schedule B-4, "Property in Reversion, Remainder or Expectancy, including property held in trust for the debtor

or subject to any power or right to dispose of or to charge" she likewise scheduled "none." [Tr. pp. 5 and 6.] George Gardner, appellant herein, was appointed Trustee at her First Meeting of Creditors, filed his bond and qualified as Trustee. [Tr. pp. 10 to 12.] In the course of the administration of the bankrupt estate it was discovered that the bankrupt had formerly owned a piece of property on Drexel Avenue, on which she was then living. Investigation of the public records disclosed that she had made a transfer of it to her daughter, Gladys Venes, and her children, without naming them, the consideration being love and affection. After due investigation, the Trustee instituted an action in the United States District Court for the Southern District of California, Central Division, seeking to set the transfer aside as fraudulent, it being the Trustee's contention that the transfer was made by the bankrupt with the intent to hinder, delay or defraud her creditors, and particularly one Harry V. Mooney at San Francisco, who had later obtained a judgment against her in a sum in excess of $10,000.00.

This action attacked not only the transfer made to Gladys Venes and her children, but also another absolute deed executed by the bankrupt to Gladys Venes alone, dated December 14, 1944. *The bankrupt was a party defendant in this action.* She employed Rupert B. Turnbull as defense attorney, a stipulation was entered into for the appointment of a guardian *ad litem* for the minor children named in the first deed attacked, an amended complaint was filed [Tr. p. 92], and answered by all defendants, *including the bankrupt,* and the issues joined. [Tr. pp. 100 to 103.] Nowhere in the answer to the amended complaint, either as an affirmative defense, or otherwise, was the homestead declaration, in controversy

here, ever mentioned or hinted at. [See answer of defendants to amended complaint, Tr. pp. 100 to 103], duly verified. [Tr. p. 103.]

The case was tried before Honorable William C. Mathes, United States District Judge, on the amended complaint and the answer thereto. The morning of the opening of the trial, the bankrupt discharged Attorney Rupert B. Turnbull in open court and announced that she, a real estate broker, was going to try her own case, which she did. The trial resulted in Judge Mathes making findings of fact, conclusions of law and a decree that the property in question had been transferred by the bankrupt voluntarily and for the purpose of hindering, delaying and defrauding her creditors, and particularly the creditor Harry V. Mooney; that at the date of bankruptcy she was indebted to numerous creditors in a sum approximating $58,000.00, and that any other property owned by the bankrupt in an amount sufficient to pay the judgment obtained by the creditor, Harry V. Mooney, was concealed by the bankrupt either on her person or in the name of a corporation, and that the bankrupt did not intend to pay the judgment or claim of Harry V. Mooney, and that the same constituted a claim in the bankruptcy administration of Ruth Vena Johnson in the District Court. The Court concluded that said purported transfers should be cancelled of record and the record title vested in the plaintiff Gardner, as Trustee, the same to be administered in her bankrupt estate. [See Findings of Fact and Conclusions of Law, Tr. pp. 104 *et seq.*] Judge Mathes entered a judgment on February 10, 1949, decreeing that the plaintiff, George Gardner, as Trustee in bankruptcy for the Ruth Vena Johnson estate, was the owner of and entitled to immediate posses-

sion of said real property. [See Judgment, Civil No. 7723-WM, Tr. p. 113.]

The bankrupt took an appeal from this judgment to this Court on behalf of herself and the other defendants, being represented by Attorney Morris Lavine. The matter was argued and the judgment of the District Court was affirmed. (See *Johnson, et al. v. Gardner,* 179 F. 2d 114.) The bankrupt then applied to the Supreme Court of the United States for a writ of certiorari which was denied on April 10, 1950. The mandate of this Court then came down and was spread on the records of the District Court. [Tr. pp. 116-117.] The Trustee prepared to sell the property in the course of administration of the bankrupt estate and discovered, upon a title report coming down, that the title to the property was badly clouded, Ruth Vena Johnson appearing on the abstract of title under some eighteen different aliases under which she had operated [Tr. pp. 30-31], and for the first time the declaration of homestead which the bankrupt had filed back in 1944 came to our attention. The Trustee, being in actual possession of the property in question, instituted a summary proceeding before Referee Benno M. Brink against all persons, firms and corporations, including the bankrupt, who in one way or another had clouded the title to the property. [See petition for order to show cause quieting title to real property and order to show cause issued thereunder, Tr. pp. 21 to 34.] The order to show cause was issued, hearing set thereon, and the bankrupt, who is serving a term in the Women's

Prison at Tehachapi [see *People v. Boyce,* 99 Cal. App. 2d 439, and Finding No. VI in the Court below, Tr. pp. 75-76], filed an answer setting out her demand for the allowance of the homestead exemption in this recovered property. [Tr. pp. 40 to 44.]

A hearing was had on the order to show cause, and by reason of the fact that the property involved was property which had been fraudulently transferred and concealed by the bankrupt and which had been recovered by the Trustee for the benefit of the estate, Referee Brink, following the 1938 amendment to Section 6 of the National Bankruptcy Act, denied her claim to a homestead exemption therein. The bankrupt then took a review, not only from this order, but from a previous order of Referee Brink denying her discharge in bankruptcy (which we believe may come before this Court at the same time as this appeal), and the two reviews were heard before Judge Yankwich at different dates. Judge Yankwich affirmed the order of the Referee denying the bankrupt's discharge, and at a later date reversed the order of the Referee quieting title and directed that the bankrupt be allowed a homestead exemption in the amount of $7,500.00 out of this concealed property.

From that order the Trustee has taken an appeal and we are informed that the bankrupt is planning on taking an appeal from the order affirming the denial of her discharge. We shall probably discuss both of these appeals in the same brief for convenience not only of the Court but of ourselves.

## Specifications of Error.

### Specification I.

The District Judge erred in reversing the order of Referee Benno M. Brink, quieting title to the real property in controversy as against the bankrupt.

### Specification II.

The District Judge erred in refusing to affirm the order of the Referee quieting title to the real property in controversy in favor of the Trustee and against the bankrupt, and denying the bankrupt a homestead exemption therein.

### Specification III.

The District Judge erred in concluding that the 1938 amendment to Section 6 of the National Bankruptcy Act does not stand in the way of recognizing the homestead rights of the bankrupt in and to said real property.

### Specification IV.

The District Judge erred in allowing the bankrupt a homestead exemption of $7,500.00 in said real property based on a declaration of homestead recorded on November 18, 1944, at a time when the State law of California permitted a homestead exemption to the head of a family in the sum of only $5,000.00, there being no evidence that any subsequent declaration of homestead was filed by the bankrupt, or that she was the head of a family.

### Specification V.

The District Judge erred in holding that the bankrupt was entitled to exemptions out of property which she had transferred or concealed and which had been recovered, and the transfer of which was avoided under this Act for the benefit of the estate, in direct contravention

of the provisions of Section 6 of the National Bankruptcy Act as amended in 1938.

**Specification VI.**

The District Judge erred in ignoring the decree of Judge William C. Mathes of the United States District Court for the Southern District of California, Central Division, entered February 10, 1949, avoiding the fraudulent conveyance by the bankrupt of this property, which decree had been affirmed by this Court, petition for writ of certiorari denied by the Supreme Court of the United States, and in which the mandate of this Court was on file, and which proceedings were in evidence in the above entitled matter by reference, including pleadings, findings of fact, conclusions of law, decree and mandate.

**Specification VII.**

The District Judge erred in concluding that the declaration of homestead filed by the bankrupt on November 18, 1944, was not affected by the bankrupt's attempts to deed the property to her daughter, and that the setting aside of the fraudulent conveyance left the property in the same status as it had been before the deed was executed subject to the burden of the homestead, and in concluding that her attempted conveyance to her daughter did not operate as an abandonment of her homestead under the provisions of Section 1243 of the California Civil Code.

**Specification VIII.**

The District Judge erred in not concluding that the bankrupt was estopped from claiming any exemption in said property by virtue of the judgment of Judge William C. Mathes of February 10, 1949, decreeing that the Trustee was the owner of said property, in an action in which the bankrupt was a party and was appellant in this Court, and which decree had long since become final.

## ARGUMENT, POINTS AND AUTHORITIES.

### Specification Nos. I and II.

These two specifications can be argued together as they really mean the same thing, namely, that the District Judge erred in reversing the Referee's order and in refusing to affirm the same. It would naturally follow that if the District Judge erred in any respect on the law, that these two specifications of error should be sustained and the order of the District Court reversed. Hence, we will devote no extensive argument to the first two specifications of error but will rely on the result that must inevitably follow if any of the other specifications are sustained.

### Specification No. III.

*The District Judge erred in concluding that the 1938 amendment to Section 6 of the National Bankruptcy Act does not stand in the way of recognizing the homestead rights of the bankrupt in and to said real property.* [Judge's Conclusion of Law No. II, Tr. p. 77.]

Prior to the 1938 amendment to Section 6 of the Bankruptcy Act, many inequities resulted. Bankrupts were able to fraudulently transfer and conceal property from their trustees, and when the fraudulent transfer or concealment was discovered and the Trustee had successfully sued the fraudulent transferee, or had obtained a turnover order against the bankrupt for the concealed property, the bankrupt would then frequently come in and amend his schedules to claim an exemption out of the loot recovered by the trustee for the benefit of the bankrupt estate. It is too well known to require discussion, that a debtor cannot avoid his fraudulent conveyance and recover the fraudulently conveyed property back for himself, but that credi-

tors or their successor in interest, such as a trustee in bankruptcy, may do so. (Bankruptcy Act, Sec. 70E, 11 U. S. C. A., Sec. 110E.) The result was that the trustee could pull a fraudulent bankrupt's chestnuts out of the fire at the expense of the estate, using Sections 67 or 70 of the National Bankruptcy Act as a weapon and the bankrupt would then be permitted to profit by his own wrong in the form of an exemption out of the recovery. The courts throughout the country were sharply divided on the question, some District Courts holding that an exemption should be allowed therefrom and others holding to the contrary.

In the *Matter of White,* 109 Fed. 635, the Court said:

> "The law would be a mockery, to permit a party to take advantage of his own wrong, if after having transferred his property in fraud of the bankrupt act, and compelling the trustee in bankruptcy, at the expense of the estate, to engage in protracted litigation, to uncover his fraud and recover the proceeds of the property from the wrongtakers, the bankrupt could stand quietly by, and then come in and make his selection of $300 in money out of the fruits of the litigation necessitated by his wrong and fraud. He is within neither the letter nor the spirit of the law."

Another case involving denial of a bankrupt to exemptions out of property preferentially transferred and recovered by the Trustee, was *In re Coddington,* 126 Fed. 891, in which the Court stated:

> "In view of this, it would produce a most peculiar and anomalous result if at this stage, the bankrupt could step in and assert his exemption to that which

had been recovered, and thus defeat the very object for which a right of recovery is given by the act."

Other cases along the same line are:

*In re Wishnefsky,* 181 Fed. 896;

*In re Long,* 116 Fed. 113;

*In re Evans,* 116 Fed. 909.

With this division of authority in mind, Congress then proceeded to amend the Act in 1938 to abate this evil. It added to Section 6 of the National Bankrupty Act pertaining to exemptions, the following:

> *"Provided, however,* that no such allowance shall be made out of the property which a bankrupt transferred or concealed and which is recovered or the transfer of which is avoided under this Act for the benefit of the estate * * *."

Commenting on this amendment, Collier on Bankruptcy, 14th Edition, Volume 1, at page 840, makes the following comments:

> "Under the terms of the Act of 1938, the conflict has been stilled. * * * It is clear, therefore, that whenever the trustee recovers property transferred or concealed by the bankrupt, or where any transfer can be avoided under the terms of the Act, the bankrupt will not be allowed to come in and amend his schedules and claim exemptions out of that particular property, save in the situation within the 'except' clause."

See also:

*Matter of Rogers,* 45 Fed. Supp. 297.

In the case at bar, there was no contention that the bankrupt transferred this property to her daughter or her daughter and her grandchildren as *security*. The defendants in the fraudulent conveyance action before Judge Mathes defended on the sole ground that the transfer was made in good faith, for a valuable and fair consideration, and that the bankrupt had no interest in the property and that Gladys Venes, her daughter, and her grandchildren were the owners thereof. [Tr. pp. 101 to 103.] Judge Mathes, unfortunately for them, found differently, annulled the transfers and vested the Trustee with title to this property. [Tr. p. 115.]

We are not confronted with a situation where, during the extensive litigation before Judges Mathes, the bankrupt had amended her answer and set up that she had theretofore filed a declaration of homestead against this property and that the conveyance was not fraudulent. On the contrary she maintained throughout, that the property *did not belong to her* [Tr. p. 102], that she had no interest in it, and not only did Judge Mathes disagree, but this Court and the Supreme Court of the United States sustained him. Consequently, the property in question, from the moment Judge Mathes' judgment became final, constituted property "which is recovered or the transfer of which is avoided under this Act for the benefit of the estate," and title to which was vested in the Trustee by Judge Mathes' final decree. [Tr. p. 115.]

We respectfully submit that the amendment of 1938 means exactly what it says in plain English, namely, that a fraudulent bankrupt cannot be allowed exemptions out of fraudulently transferred or concealed property, where he has not laid his cards on the table in his schedules

and disclosed the transaction. Collier, further discussing this amendment, says:

> "It was thought by the framers of the Act that 'a bankrupt should not profit at the expense of the creditors from the efforts of the trustee in undoing the bankrupt's own acts.' See Analysis of H. R. 12,889, 7th Cong., 2d Sess. (1936) 28, * * * See also statement by Mr. Watson B. Adair, member of the National Bankruptcy Congress, in House Hearings on H. R. 6439, 75th Cong. 1st Sess. (1937) 29."

At this point, it might be well to discuss Specification of Error No. VIII as it is closely related to Specification No. III.

Specification No. VIII states that:

> *"The District Judge erred in not concluding that the bankrupt was estopped from claiming any exemption in said property by virtue of the decree of Judge William C. Mathes of February 10, 1949, decreeing that the trustee was the owner of said property, in an action to which the bankrupt was a party and was appellant in this court, and which decree had long since become final."*

The Trustee, in seeking to undo the mischief, joined all of the parties to the fraudulent conveyance in the action of *Gardner v. Venes,* No. 7723 WM, among these defendants being the bankrupt, asking that the fraudulent transfer be avoided and the bankrupt be required to account to the Trustee for the rents, issues and profits collected by her during the period of the fraudulent conveyance. The bankrupt, Ruth Vena Johnson, appellee here, was a direct party defendant in that suit and took full

charge of the management and control of the defense thereof as appears from the statement of facts set forth in the opinion of Judge McCormick in *Johnson, et al. v. Gardner,* 179 F. 2d 114. [See also, Tr. pp. 104-105.] The decree in that case was explicit and was in evidence by reference in the proceedings before Referee Brink. [Tr. p. 20.] This decree expressly finds that the appellant here is the owner of and entitled to immediate possession of said real property. [Tr. p. 115.] The decree in question had long since become final, with the stamp of approval both of this Court and of the Supreme Court of the United States thereon. [Tr. p. 116.]

This decree was pleaded in allegation No. IV of the Trustee's petition for order to show cause quieting title to real property and every element of *res judicata* is set forth therein. [Tr. pp. 22-23.] The decree of Judge Mathes was recognized as final and *res judicata* in the Referee's finding of fact No. I [Tr. pp. 48 to 49], and in his conclusion of law No. III. [Tr. of Record, p. 52.]

It is well settled, not only in Federal courts but in the courts of every State in the Union, that where litigation is terminated in a court of competent jurisdiction involving identity of parties, and identity of issues, especially involving title to real property, the final decree of that court of competent jurisdiction is conclusive and final, and none of the defendants nor their privies can thereafter litigate the issues over again under another guise, if those issues could have been determined in the original proceeding.

See:

*Sampsell v. Gittelman,* 55 Cal. App. 2d 208 at 214;
*Fisher v. Medwedeff,* 184 Md. 167, 40 A. 2d 360.

Now let us for a moment analyze the situation here. It is true that Judge Yankwich, in reversing Referee Brink, has proceeded on the theory that the bankrupt could not fraudulently transfer her homestead exemption insofar as creditors were concerned. However, conceding for the sake of argument that this might be true, Ruth Vena Johnson was a party defendant in the action before Judge Mathes. She denied that she had made a fraudulent conveyance of the property in question. She made no mention in her answer of any homestead declaration thereon but prayed that the Court decree and determine the title of the real property to be vested in the defendants Venes, and that the plaintiff take nothing by his action. Had she and her privies, fraudulent transferees, desired to rely on the homestead declaration filed in 1944, this defense should have been pleaded and advanced, especially in view of the provisions of Section 1243 of the Civil Code of California, which reads as follows:

> "A homestead can be abandoned only by a declaration of abandonment *or a grant thereof* executed and acknowledged * * * (2) by the claimant if unmarried." (Italics ours.)

This was not done and the bankrupt consistently maintained that the property in question was her daughter's and that *she had no interest at all therein.* Then after the Trustee had battled her and her co-defendants clear to the United States Supreme Court, for the first time, long after the decree in that action had become final, we find another District Judge holding that notwithstanding Judge Mathes' final decree, holding that the property in question belonged to the Trustee, the former decree of Judge Mathes was not binding. The District Judge apparently went on the theory that after we had set this

transfer aside, recovered the property and vested title in the Trustee, because, in order to sell the property, it was necessary to bring an action to quiet title and remove the clouds therefrom, and because we were compelled to join the bankrupt as one of some thirty-eight respondents in said action, we again reopened the whole controversy, and that although Judge Mathes' decree was pleaded and offered in evidence in the summary proceedings, it would avail us nothing as our muniment of title. We respectfully submit that District Judge Yankwich ran absolutely counter to all rules of law pertaining to *res judicata* and estoppel by judgment. Had the bankrupt not been a party to the litigation before Judge Mathes—and a very active party, incidentally— [Tr. p. 104] the situation might possibly be different. The fact remains, however, that she was the moving spirit in the defense camp in that litigation, ran the entire show herself, and certainly was concluded by the judgment of Judge Mathes, and we respectfully submit that Judge Yankwich erred in not giving full faith and credit to the decree of his colleague on the District Court.

It is well settled in California, and we believe in all other States and under Federal jurisdiction, that not only is a party to litigation concluded by matters therein litigated, but is also concluded by matters which might have been adjudicated therein as being germane to the issues.

> "A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as an estoppel not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which

might with propriety have been litigated and determined in that action." (34 Corpus Juris, Judgments, Section 1236.)

Citing:

*United Shoe Machinery Corp. v. U. S.,* 258 U. S. 451;

*Bates v. Bodie,* 245 U. S. 520;

*Troxell v. Delaware, etc. R. Co.,* 227 U. S. 434;

*Virginia-Carolina Chemical Co. v. Kirven,* 215 U. S. 252;

*Northern Pac. R. Co. v. Slaght,* 205 U. S. 122.

And numerous other cases in practically all, if not all, of the States of the Union.

This is particularly so where title to property is involved in litigation and matters which might have been urged for or against the title or interest claimed in the property were not urged.

*Ivancovich v. Weilenman,* 144 Cal. 757.

In 15 Cal. Juris., Judgments, Section 206, we find the following:

"Subject to the general limitations elsewhere discussed, an adjudication of title is conclusive not only as to the matters actually urged but all those which might have been urged for or against the title or interest claimed in the property, even including a previous judgment or decree adjudicating the title."

Citing:

*Semple v. Ware,* 42 Cal. 619;

*Semple v. Wright,* 32 Cal. 659.

In *Erving v. J. H. Goodman & Co. Bank, et al.,* 171 Cal. 559, at the conclusion of its opinion in support of the above principle, the Supreme Court of California said:

> "It is the rule that where possession and damages are both sought in an action in replevin, such a suit will be regarded as a waiver of any claim which might be asserted by reason of a lease. (Coburn v. Goodall, 72 Cal. 498, 506.) Such an action is incompatible with any claim of right under a lease, because the damages include the detriment caused by the detention of the property from its owner. The action was between the same litigants, and the subject matter was the same property and the amount due for its detention. Such a judgment is conclusive between the parties not only upon the matters actually litigated but upon every ground of recovery. (24 Am. & Eng. Ency. of Law, 2d ed., 781; Sullivan v. Triunfo Min. Co., 39 Cal. 459; Bingham v. Kearney, 136 Cal. 175, 177; Flynn v. Hite, 107 Cal. 460.
>
> "When plaintiff brought the replevin suit he repudiated the contract of lease. His course was an election of remedies, that is, he chose to assert one of two inconsistent remedial rights, and is bound by such choice." (Citing cases.)

The second most recent case on this subject in California is the case of *Nellis v. Guidotti,* 105 A. C. A. 10, which case cites with approval the cases of *Smith v. Schuler Knox Co.,* 85 Cal. App. 2d 96; *Scarbourough v. Briggs,* 81 Cal. App. 2d 161, and *McManus v. Bendlage,* 82 Cal. 2d 916 at page 922.

See also:

*Basore v. Metropolitan Trust Co.,* 105 A. C. A. 1006, Aug. 6, 1951.

In the case at bar, the bankrupt and her daughter were sued as joint tort feasors. Both answered and both contested the litigation. Either or both had the alternative of setting up the defense; that the property transferred was the bankrupt's homestead, and that creditors were not concerned; or, on the other hand, setting up the defense that the transfer was for a fair and valuable consideration; that the bankrupt had completely parted with any right, title and interest in or to the property, and that Gladys Venes was the undisputed owner thereof. They chose the latter alternative, making no mention whatsoever of the homestead. It is very evident that it was the clear intention of the bankrupt to abandon her previously declared homestead thereon. (Civ. Code, Sec. 1243.)

The cases of *Vieth v. Klett,* 88 Cal. App. 2d 23, and *Palen v. Palen,* 28 Cal. App. 2d 602, apparently relied upon by the District Judge, are nowise in point. In these cases there was no intention to convey any beneficial interest to the transferee. In fact, in the case of *Vieth v. Klett,* the transfer was merely a formality, made to a third party, to be reconveyed to the transferor and his spouse in joint tenancy. In other words, the parties simply undertook to convert a tenancy in common into a joint tenancy and the vesting of the title in the third person was purely momentary. We have no such situation here.

As we have heretofore pointed out under Section 1243 of the Civil Code of California, a homestead may be abandoned by a grant thereof. The leading case on that subject, so far as we have been able to ascertain, is *Faivre v. Daley,* 93 Cal. 664. In that case, at page 668, the Supreme Court of California begins a discussion two pages long, discussing the definition of the word "grant." This

comprehensive discussion adopts the following definitions from various State court decisions and legal treatises. We shall set them out somewhat sketchily.

> "'The word "grant," taken largely, is where any thing is granted or passed from one to another; and in this sense it comprehends feoffments, bargains and sales, gifts, leases in writing or by deed, and sometimes by word without writing.' (3 Washburn on Real Property, 5th ed., 193,375.) * * * In our statute, by the term 'grant,' the legislature intended all the ordinary modes of acquiring property by deed, whether operating by force of the statute of uses or not, that by long usage such had become not only the popular but also the technical meaning of the term.' (Ross v. Adams, 28 N. J. L. 165.) In Durant v. Ritchie, 3 Mason 69, the court said: 'The word "grant" is *nomen generalissimum*. It includes all sorts of conveyances.'"

Quoting from *McVey v. Green Bay etc. R. R. Co.,* 42 Wis. 536, the Supreme Court of California said:

> "'But the word "grant" has also a larger meaning in the law. It is said in Sheppard's Touchstone that this word is taken largely where anything is granted, or passes from one to another. * * * Hence, in any view we can take of the question, we are impelled to the conclusion that the word "grant," as used in the statute, includes deeds of bargain and sale.'
>
> "It is admitted that Carleton was the owner of the property at the time the declaration of homestead was filed; and as a quitclaim deed in this state passes all the title which the grantor has (Lawrence v. Ballou, 37 Cal. 518), we think the deed from Carleton and wife to plaintiff was a grant, within the meaning of section 1243 of the Civil Code, which operated as

an abandonment of their homestead right, and that it conveyed to plaintiff all the interest they had in the property."

The rule laid down in the foregoing case was followed by the District Court of Appeal for the Fourth Appellate District in *White v. Rosenthal,* 140 Cal. App. 184, and amplified to hold that a grant thereof extended even to an involuntary transfer or a transfer by operation of law. At page 186, after citing Section 1243 of the Civil Code and the case of *Faivre v. Daley,* 93 Cal. 664, the Court says:

"A transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another. (Civ. Code, sec. 1039.) The word 'grant' as used in Civil Code, section 1243, is applicable to all transfers of real estate and this would include transfers by operation of law as well as the voluntary transfers of the owners of property. * * *

"When the mortgagor disposes of the mortgaged premises either by his own deed or by operation of law he loses all control over them. His personal liability thereby becomes separated from the ownership of the land, and he can by no subsequent act create or revive charges upon the premises. He is, as to the premises, thenceforth a mere stranger. With respect to the property placed beyond his control he has no personal privilege. He cannot at his pleasure affect the interests of other parties. (Lord v. Morris, 18 Cal. 482.)

"When the premises herein concerned were sold at foreclosure sale the owners thereof lost all control over them and the homestead thereon was as completely and effectually abandoned as though appel-

lants had disposed of their property by grant deed. The fact that appellants and the mortgagee were, during the latter part of the period of redemption, engaged in negotiations to refinance the property and contemplating a reconveyance of it to appellants, does not change the rule. No rights existing or contemplated in the transferor in and to the property survive the transfer of the property. * * *

"In order to protect their homestead rights it was necessary when they again became the owners of the property to file a new declaration of homestead. (Johnston v. Bush, 49 Cal. 198; Corey v. Matot, 47 Cal. App. 184. Apparently this requirement was recognized by appellants for they did file a new declaration on June 25, 1931. Being filed, as it was, after the sheriff had levied on the property, the second declaration of homestead could not operate to exempt the property from execution sale."

See also

*Bank of Suisun v. Stark,* 106 Cal. 207.

As pointed out before, the bankrupt did not schedule this property in her sworn schedules in bankruptcy nor in any manner disclose the fact that she had conveyed this property by deed to her daughter, nor did she claim it exempt, nor for that matter has she yet amended her schedules and claimed it exempt. She has consistently stood on the basis that she was not the owner of the property but that her daughter was. Hence no attempt was made to claim it exempt until the Trustee had recovered it for her estate.

It is well settled that in order to have an exemption allowed in a bankruptcy proceeding, even independent of the 1938 amendment to Section 6 of the National Bank-

ruptcy Act, the bankrupt has been required, throughout the life of the Bankruptcy Act of 1898, to disclose his property in his schedules and to claim his exemptions, if the adjudication was on a voluntary petition, in the schedules filed therewith, and in an involuntary proceeding within ten days after adjudication.

In the *Matter of Gerber,* 186 Fed. 693, this Court, in an opinion written by the late Judge Ross, said:

> "While the exemption right in the case in hand depends upon the statutes of Washington, as had already been said, the manner of claiming such exemptions and of setting apart and awarding them is regulated by the bankruptcy act. In re Friedrich, 100 Fed. 284; In re Mayer, 108 Fed. 599. And the Supreme Court, by virtue of the bankruptcy act, has prescribed the time and manner of preferring such claims. No. 38 of the General Orders in Bankruptcy, so prescribed, provides:
>
> " 'That the several forms annexed to these general orders shall be observed and used.' 32 C. C. A. xxxvii, 89 Fed. xvi.
>
> "And the official form so annexed requires, among other things:
>
> " 'A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.'
>
> "General Order 17 (32 C. C. A. xix, 89 Fed. viii), which defines the duties of the trustees, requires him to 'make report to the court within twenty days after receiving the notice of his appointment,

of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report.'

"Section 47 of the act, referred to in the order last quoted, also defines the duties of the trustees, which duties include the direction to (11) 'set apart the bankrupt's exemptions, and report the items and estimated value thereof to the court as soon as practicable after their appointment.'

"And Form 47 * * * prescribed by the Supreme Court requires the trustee to set forth in the report which is thereby required of him a schedule of the 'property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy.'

"The rules and forms so prescribed by the Supreme Court under and by virtue of the bankruptcy act have the force and effect of law, and it therefore seems to us to result necessarily that the bankrupt here, even though it should be conceded that he was not limited to the species of property specified in the statute of Washington as hereinbefore indicated, lost any right he may have had to the exemptions claimed, by his failure to make the claim in the manner and within the time legally prescribed therefor. And it has been so decided. In re Von Kern (D. C.), 135 Fed. 447; In re Blanchard, 161 Fed. 793; In re Prince & Walter, 131 Fed. 546; In re Duffy, 118 Fed. 926; In re Staunton, 117 Fed. 507; In re Haskin, 109 Fed. 789; In re Wunder, 133 Fed. 821;

In re Pfeiffer, 155 Fed. 892. See, also, Moran v. King, 111 Fed. 730, 49 C. C. A. 578.

"It also results from what has been said that the bankrupt was not entitled to the cash allowance in lieu of provisions and fuel.

"The judgment is reversed, with directions for further proceedings in accordance with the views above expressed, and with costs in favor of the petitioners and against the respondent."

In *Brant v. Mayhew,* 218 Fed. 422, at page 427, this Court said:

"In certain cases where the bankrupt prior to bankruptcy has conveyed his property for the purpose of giving a fraudulent preference, or to conceal the property in fraud of creditors, and thereafter the trustee in bankruptcy, for the benefit of the creditors has, by his own action, recovered the property, it has been held that there can be no claim of homestead exemption, since the trustee has restored to the estate property which, but for his efforts, would have passed both from the bankrupt and his creditors. In re Coddington, 126 Fed. 891; In re Evans, 116 Fed. 909; In re White, 109 Fed. 635; In re Tollett, 105 Fed. 425; In re Long, 116 Fed. 113; In re Wishnefsky, 181 Fed. 896. These decisions are based upon the ground that to permit the bankrupt thereafter to claim exemptions would be to allow him to take advantage of his own wrong, or on the ground that he can have no right to extend his claim over that to which he has no title, except through the intervention and instrumentality of the trustee. But in the present case no preference was made, and there was no fraudulent transfer. In good faith Mayhew and his wife had con-

> veyed all their property to an assignee for the benefit of all creditors. Bankruptcy ensued before the assignee accepted the trust, and he at once released to the trustee in bankruptcy. Such a voluntary conveyance *for creditors* can have no effect upon the right of the bankrupts thereafter to claim the exemptions provided by law. The effect of the bankruptcy and the transfer of the property by the assignee to the trustee in bankruptcy was to leave the estate as it would have been if there had been no such voluntary conveyance." (Italics ours.)

Circuit Judge Ross, who had written the opinion of the Ninth Circuit in the *Gerber* case, dissented from this opinion as being in direct conflict with the Eighth Circuit decision in *In re Youngstown,* 153 Fed. 98. *In Brant v. Mayhew,* the bankrupt had acted in good faith, making a general assignment for *all* of his creditors.

See also

*In re Hupp,* 48 F. 2d 159.

In the case at bar, District Judge Mathes has found the bankrupt to be a party to a corrupt fraudulent transfer to a near relative and the Referee has found that she concealed this property from her Trustee in bankruptcy and made no effort to assert a homestead right against it until, to use a slangy term, she and her daughter were smoked out and compelled to disgorge it, and she now seeks the aid of a court of equity to allow her an interest in the loot recovered which she could not by any stretch of the imagination have recovered herself.

In *Martin v. Oliver,* 260 Fed. 89 (C. C. A. 8th Cir.), the Court said:

> "Finally, a court of bankruptcy is a court of equity and it administers the law in the spirit of equity. One cannot read the record that was before the court below and that is before this court, without a strong conviction that the petition for an adjudication in bankruptcy and the application for the exemption of this property was another attempt of the bankrupt, like her making of the fraudulent mortgage to Ruble and her endeavor to ship all her property permanently out of the State to Meade Oliver, by the use of the bankruptcy court to hinder, delay and to defraud the accommodation surety into paying her debt, and to prevent him from obtaining repayment. A Federal court of equity ought not to permit itself to be used for the purpose of perpetrating a fraud or attaining an inequitable result which a State court is successfully endeavoring to prevent. Zeitinger v. Hargadine-McKittrick Dry Goods Co. (C. C. A. 8th Cir.), 719."

See also

*Matter of Rogers,* 45 Fed. Supp. 297;
*Matter of Raggozino,* 38 Fed. Supp. 53;
*Hyman v. Stern,* 43 F. 2d 666 at 668.

And even in a criminal case where a witness has testified for the Government and has not testified that stolen property transported in interstate commerce was in excess of $5000.00 value and thereafter made an affidavit to the effect that it was worthless, the Court is justified in casting grave doubt on the veracity of the statements made in her subsequent affidavit. (*United States v. Riccardi,* 88 F. 2d 416 at 417 and 418.)

## Conclusion.

We do not see how this Court can do anything else but reverse the District Judge in this case. Were the bankrupt possessed with the slightest degree of honesty, there might possibly be some justification or excuse for the Court below invoking technicalities in her behalf, but such is not the case here. Ruth Vena Johnson's bankruptcy throughout its entire history beginning in April, 1947, over four years ago, has been surrounded by an over-ripe aroma, anything but pleasing to the nostrils of any person whose conscience has the slightest conception of distinction between right and wrong. After "taking" Harry V. Mooney of San Francisco for over $10,000.00 and additional creditors for another $48,000.00, this bankrupt realized that Mooney, for one, was not going to take it lying down. She hurriedly disposed of the home on Drexel Avenue, in which she was living, and on which she had theretofore filed a declaration of homestead, with the idea of frustrating Mooney's attempt to collect his money. As found by Judge Mathes, such other assets as she possessed were concealed by her, either on her person or in the names of corporations, and she was thus effectually stripped of every asset to which Mooney could look in the collection of his claim. (*Buffum v. Barcloux Co.,* 289 U. S. 227.) She falsely swore in her schedules in bankruptcy that she owned no real estate nor any interest in land [Tr. p. 6], nor any property in reversion, remainder, trust or expectancy [Tr. p. 5] which would pass to the Trustee. Upon discovery of her fraudulent conveyance of this property and after the Trustee had failed to make a report setting aside this, or any, property as exempt, [Tr. pp. 59-60] by reason of her concealment, suit was instituted to recover the prop-

erty when the facts ultimately came to light. The bankrupt took full charge of the fight, first retaining Attorney Rupert B. Turnbull, who filed answers on behalf of all of the defendants, including the bankrupt. She discharged him from the case the morning of the trial and took charge of the active defense herself. Her fraud, and the evidence thereof, was so conclusive that when she appealed to this Court from an adverse judgment she did not even attempt to challenge the sufficiency of the evidence to sustain Judge Mathes' strong findings against her but relied entirely upon the contention that she had been deprived of her constitutional right to a jury trial, in conformity with her belated demand the morning of the trial. (See *Johnson, et al. v. Gardner,* 179 F. 2d 114.) This Court affirmed the judgment of Judge Mathes and the United States Supreme Court denied certiorari and the judgment became final. Then when the Trustee attempted to clean up the mess that she had made of the title to this property, in order to get a policy of title insurance for the buyer at the bankrupt sale, by reason of the fact that he had to join her in this proceeding under the eighteen or nineteen different aliases behind which she had been masquerading, she filed an answer from Tehachapi, California Institution for Women, where she was serving a term of imprisonment for conviction of another one of her nefarious felonies. Referee Brink, following the law, declined to permit her at that late stage of the proceeding to come in and claim a homestead exemption in property which had been recovered by the Trustee and which she could not have recovered back from her daughter in one hundred years. Judge Yankwich reversed the Referee, and in doing so, we submit, went contrary to every established conception of the law,

completely overlooking the fact that a Court of Bankruptcy is a court of equity and will not aid in the perpetration of a fraud. (See *Martin v. Oliver, supra.*) The District Judge held that she was entitled, now that we had undone her numerous wrongs against her creditors, to a homestead exemption of $7500.00 out of the recovery.

We respectfully submit that the holding of the District Judge is contrary to every concept of law in the following respects:

1. In her sworn schedules the bankrupt disclaimed any interest in this property whatsoever and is now estopped from changing her position at her convenience after the Trustee has recovered the same.

2. That the bankrupt has not come into the District Court, or before the Referee, with clean hands and is not entitled to any consideration or relief from a court of equity to assist her in furthering the wrong committed against her creditors or to grant her any relief.

3. That the judgment of Judge Mathes avoiding the fraudulent conveyance and decreeing that the property in question belonged to the Trustee, having become final, is conclusive and *res judicata* and that the District Court erred in ignoring the effect of Judge Mathes' decree, which, with his findings of fact and conclusions of law, was in evidence in this proceeding.

4. That Judge Yankwich went absolutely contrary to the plain provisions of Section 1243 of the Civil Code of California in holding that the bankrupt had not executed a grant of said homesteaded property when she conveyed it to her daughter, notwithstanding the fact that, as be-

tween the parties to the conveyance, the grant was absolute and binding.

5. The District Judge further erred in going squarely contrary to the Amendment of 1938 to Section 6 of the Bankruptcy Act which expressly provides that a bankrupt shall not be allowed an exemption out of property which the bankrupt has transferred or concealed and which was recovered, or the transfer of which was avoided, under the act for the benefit of the estate. Notwithstanding the abstruse reasoning he has indulged in, the fact remains that the Bankruptcy Act absolutely governs where a claim of exemption is made to property of an estate in bankruptcy which has been fraudulently conveyed or concealed.

6. Lastly, the District Judge erred in fixing the value of the bankrupt's exemption at $7500.00. The declaration of homestead was filed in 1944, at which time Section 1260 of the Civil Code of California fixed the exemption of a married bankrupt or head of a family at $5000.00. In the first place, there was no evidence that the bankrupt was married or the head of a family at the time she filed the declaration of homestead in 1944. In 1945, the statute was amended to provide a $6000.00 homestead exemption to the head of a family, and a subsequent amendment raised it to $7500.00. The District Judge arbitrarily allowed the bankrupt a $7500.00 exemption in property under a statute which provided a maximum of $5000.00 in 1944, and this we submit constituted additional error.

We have referred the Court to the opinion of the late Judge Ross of this Court in the *Matter of Gerber,* 186 Fed. 693, but we would like to quote from the language

judgment against him. It is too well established to require even discussion that if the judgment creditor's rights expired by virtue of the Statute of Limitations and the debtor then decided it was to his best interests to get his property back, he could not be heard to go into the Superior Court and file suit against the fraudulent transferee, setting up in his complaint that the transfer was made without consideration and with intent to hinder, delay or defraud his creditor, but now that the Statute of Limitations had run against the creditor, he was entitled to his property back. Under well established rules of law, such a complaint would be promptly thrown out of court and the dishonest debtor would apparently be without a remedy. (12 Cal. Juris., Fraudulent Conveyances, page 1026, citing *Donnelly v. Reese,* 141 Cal. 56; *Alaniz v. Casenave,* 91 Cal. 41, and numerous other cases in Note 16.) However, under the holding of the District Court in this case, the dishonest knave would not be entirely frustrated. If he owed other creditors, all he would need to do would be to file a petition in bankruptcy, let his Trustee know that he had made this fraudulent conveyance, and the Trustee could then invoke the provisions of Section 67 or Section 70 of the Bankruptcy Act, recover the property, and the bankrupt could then step in and clean up on the proceeds, for his own benefit, on the ground that the property so transferred would have been exempt under State law. Such a situation, in the writer's opinion, would be unconscionable and we are certain that this Court will not tolerate the type of conduct that this bankrupt has indulged in, in this latest vexatious litiga-

tion any more than it did in affirming the judgment of Judge Mathes setting the transfer aside and decreeing the Trustee to be the owner of property which the bankrupt now claims at the eleventh hour belongs to her. (*Johnson, et al. v. Gardner,* 179 F. 2d 114.)

We respectfully submit that the order of the District Judge should be reversed and the order of Referee Benno M. Brink affirmed, to the end that this bankrupt's vexatious litigation be terminated—at least during our lifetime.

Respectfully submitted this 12th day of September, 1951.

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